

E-132, 299/SA-88-996 ORDER DETERMINING MOTION FOR PARTIAL SUMMARY
DISPOSITION

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Don Storm
Tom Burton
Cynthia A. Kitlinski
Dee Knaak
Norma McKanna

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of the Application
of the City of Rochester to
Adjust its Service Area Boundary
with People's Cooperative Power
Association, Inc.

ISSUE DATE: August 7, 1992

DOCKET NO. E-132, 299/SA-88-996

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PARTIAL SUMMARY DISPOSITION

PROCEDURAL HISTORY

I. Proceedings to Date

This case is a consolidation of several dockets involving service area boundary and compensation disputes between two neighboring utilities, People's Cooperative Power Association, Inc. (People's or the co-op) and the City of Rochester. The case was first referred to the Office of Administrative Hearings for contested case proceedings on September 14, 1989. Since then the Commission has consolidated related dockets with this proceeding and has referred other dockets for factfinding on this proceeding's record. The Administrative Law Judge and the parties have concurred in these consolidations and referrals.

At the prehearing conference at the beginning of this proceeding, the parties and the Administrative Law Judge agreed that the most efficient way to proceed would be to conduct evidentiary hearings in two phases. Phase I would determine the original service area boundaries of the two utilities, their current service area boundaries, and whether the circumstances of any unauthorized service extensions warranted a referral for penalty proceedings. Phase II would determine appropriate compensation for the City's acquisition of all portions of People's' service territory within the Rochester city limits.

Phase I of the proceeding has been completed. On December 28, 1990 the Commission issued its INTERIM ORDER DETERMINING 1975 SERVICE AREA BOUNDARIES, DETERMINING SERVICE AREA CHANGES SINCE 1975, AND REFERRING SERVICE AREA VIOLATION TO THE ATTORNEY GENERAL. Phase II is in progress.

On February 13, 1992 the City moved for partial summary disposition in the form of an Order finding that People's compensation claims for subdivisions and customers to whom City service was extended before March 23, 1987 were barred by the legal doctrines of waiver, estoppel, and laches. The City later amended its motion to include compensation claims for all areas annexed before March 23, 1987, whether or not service had been extended to particular customers.

People's opposed the City's motion. The Department of Public Service (the Department) contended that compensation claims for all areas annexed before April 24, 1984 were barred by laches. The Department opposed the City's waiver claim on public policy grounds.

On April 15, 1992 Administrative Law Judge Phyllis A. Reha issued her Findings of Fact, Conclusions of Law, and Recommended Order. She recommended upholding the City's laches and waiver claims as to annexations occurring before April 24, 1984. She found it unnecessary to reach the City's estoppel claims.

The matter came before the Commission on May 28, 1992. The City, the co-op, and the Department appeared. Joseph F. Chase, O'Brien, Ehrick, Wolf, Deaner & Maus, Sixth Floor, Marquette Bank Building, Rochester, Minnesota, represented the City. Kenneth R. Moen, Dunlap, Finseth, Berndt & Sandberg, P.A., 505 Marquette Bank Building, Rochester, Minnesota represented the co-op. Eric F. Swanson and Brent Vanderlinden, Special Assistant Attorneys General, 1100 Bremer Tower, Seventh Place and Minnesota, St. Paul, Minnesota represented the Department.

Having examined the entire record herein and having heard the arguments of counsel, the Commission makes the following findings, conclusions, and Order.

FINDINGS AND CONCLUSIONS

II. Factual Background

In 1974 the Minnesota Legislature required the Commission to divide the state into geographical areas, called assigned service areas, in which electric utilities would have exclusive service rights. The Legislature believed exclusive service territories were necessary to encourage the development of coordinated statewide electric service, to avoid unnecessary duplication of electric facilities, and to promote the provision of economical, efficient, and adequate electric service throughout the state. Minn. Stat. § 216B.37 (1990).

The statute encouraged utilities to agree on service area boundaries and to file maps reflecting their agreements. Minn. Stat. § 216B.39, subd. 4 (1990). The original service area

boundaries between People's and the City were set in this way. The utilities filed a map reflecting their agreement in September of 1974. The map was accepted and adopted by the Commission as the official service territory map in April of 1975.

When they filed their map and agreement in September 1974, the two utilities also filed a copy of a 1970 compensation agreement on how they would determine compensation when the City decided to extend service to City residents within People's' assigned service area. (The service area statute allows municipal utilities to expand their service areas to include areas within their city limits under specified circumstances. Minn. Stat. § 216B.44.) They stated they intended to rely on the compensation agreement to resolve compensation issues arising between them and would seek Commission resolution of such disputes only as a last resort. The compensation agreement ended in 1984, when it was rescinded by People's Board of Directors.

From 1975 until this proceeding, neither People's nor Rochester asked the Commission to change the official service area boundaries or to determine compensation for any service territory acquisition. During that time, however, the City extended service to approximately 1,700 customers in areas annexed in some 70 separate annexation proceedings. About 30 of these annexed areas had co-op customers or facilities on them at the time of annexation. The other areas were "bare ground" annexations, i.e., areas where there were no co-op customers or facilities at the time of annexation. In these cases, Rochester simply began extending service. The compensation agreement did not explicitly address the compensation implications of bare ground annexations.

Both utilities were slow to recognize the magnitude of the service area problems that were developing. This was undoubtedly due in part to Rochester's practice of annexing small parcels of land individually, when their owners requested annexation, as opposed to taking a more comprehensive approach. It was also due in part to People's' failure to object, or at least to object to the point of seeking Commission or judicial intervention. By the time People's began filing service area complaints in 1987, Rochester had committed itself to serving all City residents, and was well on its way to achieving that goal.

On March 23, 1987 People's filed the first of many complaints challenging Rochester's right to serve annexed areas where compensation had not been specifically determined. These complaints involved "bare ground" annexations, i.e., areas where there had been no customers or co-op facilities at the time of annexation. The City claimed that, since the 1970 compensation agreement did not state a compensation figure for such areas, no compensation was due. The City also claimed that, under the compensation agreement, the right to serve such areas passed automatically to the City upon annexation, a claim the Commission rejected at the end of Phase I of this proceeding.

III. Summary of the Issues

Although the Commission decided in Phase I that the 1970 compensation agreement did not give the City service rights to "bare ground" annexations automatically, the Commission did not address the significance of the agreement, and the utilities' behavior under the agreement, for compensation rights. That is the issue before the Commission today.

The City claims that it believed the 1970 compensation agreement allowed it to serve "bare ground" annexations without paying compensation; that the co-op's behavior reinforced this belief; and that the City made expensive investments and important policy decisions in reliance on this belief. The City contends co-op claims for compensation for bare ground annexations are therefore barred by the doctrines of laches, waiver, and equitable estoppel.

Briefly stated, laches is an unreasonable delay in asserting a known right, under circumstances causing prejudice to others and making it inequitable to allow the right to be enforced. Waiver is the intentional relinquishment of a known right. Equitable estoppel bars claims by parties who knowingly misrepresent material facts leading up to a claim, inducing foreseeable, reasonable, and detrimental reliance by the party against whom they seek to enforce the claim.

IV. Summary of Commission Action

The Commission is convinced that compensation claims for bare ground annexations completed while the two utilities had a compensation agreement in place are barred by laches. It is therefore unnecessary to decide the complex policy issues presented by the City's claim of waiver. Similarly, it is unnecessary to address the City's equitable estoppel claim, which was not analyzed in full by the Administrative Law Judge. Finally, the Commission clarifies that laches bars compensation claims for all portions of all annexed areas at issue, not just annexed areas or portions of annexed areas to which service has been extended.

The Commission accepts and adopts the 43 Findings of Fact made by the Administrative Law Judge. Those findings reflect her extensive familiarity with the record, are consistent with the Commission's own reading of the record, and are adopted in their entirety. The Commission accepts and adopts the Conclusions reached by the Administrative Law Judge, with the exceptions of Conclusions 12, 13, and 16, which deal with the waiver issue.

V. The Laches Claim

A. Before the Compensation Agreement was Rescinded

The Commission agrees with the City, the Department, and the Administrative Law Judge that the co-op's failure to raise compensation claims for bare ground annexations while its compensation agreement with the City was in force constituted an unreasonable delay and worked to the City's prejudice. To allow the co-op to raise those claims now would be inequitable. The claims are therefore barred by laches.

From 1975 until the rescission of the compensation agreement, the City conducted its utility planning on the assumption that it could serve bare ground annexations without paying compensation. This belief was reinforced by the co-op's failure to assert compensation claims in such cases, by the compensation agreement's failure to provide compensation for future growth, and by co-op actions inconsistent with an intent to claim compensation for bare ground acquisitions.

People's failed to assert any compensation claim for bare ground annexation until 1985, when it raised the issue for the first time in compensation negotiations over the Willow Center annexation. In fact, until it rescinded the compensation agreement in 1984, the co-op took affirmative actions giving the impression it did not believe compensation was due. On approximately 12 separate occasions, the co-op gave the City plat maps of new bare ground annexations for the express purpose of helping the City extend service to them. On at least three occasions the co-op helped the City extend service to bare ground annexations by entering into joint construction projects in which the two utilities shared utility poles. Furthermore, when the two utilities applied the compensation agreement to determine compensation for areas where there were existing customers or facilities, the co-op continued to accept compensation awards with no component for future growth.

Cooperation on this scale cannot be viewed as random or inadvertent. Until the co-op rescinded the compensation agreement, it was reasonable for the City to conclude from the co-op's behavior that it did not intend to claim compensation for bare ground annexations.

Furthermore, People's knew it had potential compensation claims for bare ground annexations long before it chose to raise them. People's testified it was aware of a possible right to compensation for future growth as early as 1980. By then tensions between the two utilities were surfacing, and the minutes of the meetings of both Boards reflect general discussion of service area issues. At a late 1980 meeting, People's Board gave serious consideration to bringing legal action against the City for service territory violations. In consultation with their attorney, they decided not to press their claims, believing the risk and expense of litigation outweighed its potential

benefits. This was a deliberate, informed decision not to raise the claims they raised five years later. (Meanwhile, co-op officials continued delivering plat maps to the City and cooperating in joint construction projects.)

Allowing People's to enforce, at this point, compensation rights it may have had in bare ground annexations from 1975 to 1984 would cause severe prejudice to the City of Rochester. The years 1975 to 1984 were pivotal years for the development of the municipal utility. During this time the City made significant policy decisions, and investments to carry them out, based on its belief that People's did not claim compensation for bare ground annexations.

In 1979 the City adopted and publicly announced its policy of expanding its service area to include every resident of the City of Rochester. In the early 1980's the City upgraded its Zumbro River substation, at a cost of two million dollars, to serve projected growth on the north side of town, within People's' assigned service area. Throughout this period the City invested in the equipment and facilities necessary to serve new customers locating in areas annexed as bare ground, at a cost of \$500 to \$1,000 per lot. It is now far too late to pass these costs on to the developers, something the City might have done had it known the co-op would be claiming compensation for the right to serve these lots.

Finally and most significantly, in 1981 the City entered into a 50-year full requirements contract with Southern Minnesota Municipal Power Association. Under the terms of that contract the City relinquished the right to control its own generation, agreed to sell the Association all the power it generated, and agreed to buy from the Association all the power it needed. In calculating the costs and benefits of Association membership, the City assumed it would continue adding load from parts of People's' service territory annexed as bare ground without compensation liability.

Furthermore, it would be very difficult at this point to arrive at accurate compensation figures for annexations occurring between 1975 and 1984. Memories have faded; documents have been lost or destroyed. It would be difficult to reconstruct the facts surrounding individual annexations and to establish the configuration of each utility's system at the time each annexation occurred. The Administrative Law Judge noted that two key witnesses in this process would be the people in charge of each utility's field operations during the years in question. One of these people is an elderly gentleman whose memory of these events has dimmed; the other has died. The Commission would not undertake evidentiary hearings under these difficult circumstances unless equitable concerns demanded it. Here, equitable concerns preclude it.

Finally, the Commission does not believe public policy considerations conflict with finding these claims barred by laches. In Phase I the Commission rejected the City's waiver argument, which was based on the same facts as its laches defense, because it was important to make it clear that service area boundaries do not change due to a utility's failure to assert its right to serve. To hold otherwise would have invited the kind of service area instability the service area statute was enacted to avoid. Minn. Stat. § 216B.39 (1990). This case, on the other hand, involves compensation, not rights and duties to serve. Compensation is an area over which the statute gives utilities much more discretion. In fact, the statute encourages utilities to negotiate compensation on their own without Commission involvement. Minn. Stat. § 216B.44 (1990). The Commission concludes that applying the doctrine of laches in this case does not conflict with sound public policy.

B. After the Compensation Agreement was Rescinded

On April 24, 1984 People's Board of Directors notified the City by letter that it was rescinding the 1970 compensation agreement. The Commission finds that from that time forward, Rochester was on notice that it had no compensation agreement with People's and that claims for future growth, including claims for bare ground annexations, were possible. Although People's did not raise a claim for future growth until September 1985, and did not assert a bare ground claim until March 1987, this delay was reasonable. During much of the interim period the two utilities were either attempting to negotiate a new compensation agreement or awaiting the outcome of a Commission proceeding that was expected to address the issue of compensation for future growth. Furthermore, after rescission the co-op never again gave the City plat maps for newly annexed areas and never again entered into joint construction projects to allow the City to serve customers in co-op territory. Claims arising after rescission of the agreement, therefore, are not barred by laches.

The City argued that People's agreement to use the old compensation formula for the City's acquisition of a large industrial customer in June of 1984, and accompanying correspondence expressing dissatisfaction with the old formula's valuation of lines and equipment, confused the City about People's' position. The City also argued that even People's' September 1985 claim for compensation for future growth did not amount to a claim for compensation for bare ground annexations. The Commission agrees with the Administrative Law Judge that compensation claims for bare ground annexations were clearly possible as of the date of rescission, and that the City continued extending service into newly annexed areas at its own risk.

The Commission finds that the co-op's delay in raising bare ground compensation claims after rescission was not unreasonable. The co-op was attempting to reach an agreement with the City, a course of action encouraged by statute, and was prudently

monitoring a Commission proceeding involving similar issues before committing resources to litigation or administrative proceedings. Significantly, the co-op was no longer taking actions inconsistent with claims for future growth or compensation for bare ground annexations. Under these circumstances it would not be inequitable to allow the co-op to assert claims for bare ground annexations following rescission of the compensation agreement.

C. Claims Barred Whether or Not Service Extended

The co-op, while opposing any finding of laches in this case, urged the Commission to limit any application of laches to compensation claims relating to those parts of annexed areas (usually residential subdivisions) where the City has actually extended service. The co-op contended that it was only in those cases, where the City had made the investment to extend service, that the City had been prejudiced by the co-op's failure to state its claim earlier. The Commission disagrees.

The City made long term investments in reliance on the co-op's failure to assert its compensation claims. The City conducted expensive system planning, entered into a full requirements contract with Southern Minnesota Municipal Power Association, and made costly improvements to its Zumbro River substation, in the expectation that it would serve all portions of all bare ground annexations. In light of these long term investments and their consequences, it would be inequitable to limit the application of laches to those portions of annexed areas to which the City has already extended service.

VI. The Waiver and Estoppel Claims

The Administrative Law Judge found that the co-op's claims were barred by waiver as well as laches. The Commission believes applying waiver to these claims raises serious and complex policy issues, because waiver is generally understood to apply even if no one has been prejudiced by the conduct at issue. Public interest considerations militate against allowing a utility to lose statutory compensation rights without a strong showing of prejudice to another party. Since laches has been fully established in this case, it is unnecessary to reach the waiver issue. This is equally true of the equitable estoppel claim. The Commission will therefore not decide either claim.

VII. Conclusion

For the reasons set forth above, the Commission finds that no compensation is due the co-op for the City's acquisition of those portions of its service area annexed before April 24, 1984 on which there were no co-op customers or facilities on the date of annexation.

ORDER

1. The Commission finds that no compensation is due People's Cooperative Power Association for the City of Rochester's acquisition of those portions of People's' service area annexed before April 24, 1984 on which there were no People's' customers or facilities on the date of annexation.
2. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Richard R. Lancaster
Executive Secretary

(S E A L)